HOW TO AVOID PROTECTIVE ORDERS OR GET ONE YOU CAN LIVE WITH*

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I. Example of Initial Letter Sent with Discovery

Dear Defense Attorney:

In my litigation experience, insurance companies frequently claim that their internal procedures and training materials, as well as other internal company documents, are "trade secrets" and/or "proprietary," and insist upon the entry of a protective order as a precondition for the production of such materials. I am therefore taking this opportunity to advise you of Plaintiff's position on this issue well in advance.

As you know, the Third Circuit in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (1994), set forth standards to be used by the district courts in agreeing to the entry of protective orders during the course of discovery. The Third Circuit, after noting that the party seeking the protective order must demonstrate "good cause," addressed how "good cause" is established:

"Good cause is established on a showing that disclosure will work *a clearly defined and serious injury* to the party seeking closure. *The injury must be shown with specificity*." *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984). "*Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," do not support a good cause showing.* *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied*, 484 U.S. 976, 108 S. Ct. 487, 98 L. Ed. 2d 485 (1987). The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order. 785 F.2d at 1122 n.17.

23 F.3d at 786-87 (emphasis added).

Without knowing any of the specifics about the type of documents which Defendants may wish to make subject to any proposed protective order, it

is impossible at this time to make a preliminary judgment as to whether any of the documents even merit such protection. We are willing to work with Defendants in a spirit of cooperation to fashion a narrowly tailored protective order—one designed to afford protection *only* to that information which is *truly* trade secret or proprietary in nature and which has been steadfastly maintained by defendants as such.

In order to achieve this goal, we would require Defendants' agreement to the following conditions:

1. The submission of a sworn Affidavit from the appropriate Custodian of Records explaining in detail the precise nature of the trade secret or proprietary character of each document being placed under the protective order by Defendants and including the sworn certification that Defendants have never voluntarily supplied this type of document to any person, firm, corporation, governmental authority, or entity *other* than Defendants, their companies, and their personnel.

2. The submission of a sworn Affidavit by an officer in Defendants' Legal Department that, with respect to each type of document being placed under the protective order by Defendants, Defendants have never produced this type of document in discovery in any litigation in the United States or Canada except pursuant to a protective order entered by the court.

3. The inclusion in the proposed protective order of a provision that entitles any party to the protective order the right to challenge the appropriateness of the designation of any document under the order: first, by written request to which a written response must be made within fourteen (14) days; and, second, by motion to the court. The prevailing party in such a motion shall be entitled to *all* attorneys' fees and costs incurred in relation to the motion and the court will, of course, retain its powers to impose any further sanctions that it believes appropriate under the circumstances.

In the alternative, Plaintiff is prepared to enter immediately into a protective order styled upon Judge Green's Order in *Maglione v. Provident Life and Accident Inc. Co.*, a copy of which I provided you at the conclusion of the Rule 16 Conference before Judge Dalzell. The key features of a *Maglione* style protective order are:

- Defendants immediately provide Plaintiff with a list of those companies they consider competitors;

- Once in possession of that list, Plaintiff's counsel agrees not to disclose the trade secret/proprietary documents Defendants have identified as subject to the protective order to anyone on the list;

- Plaintiff's counsel may disclose the documents to anyone else provided they sign a copy of the order and agree to be bound by the same restrictions; and,
- Plaintiff's counsel will maintain the originals of all such signed copies.

Please review the foregoing with your clients. If Defendants can agree to either of these proposals, then we can begin working together on the language of an agreement which, when perfected, can be submitted jointly to the Court, together with the Affidavits, for the Court's approval. I look forward to your early response.

Thanking you for your attention in this matter and with kind regards, I am

Alan H. Casper

II. Follow-Up Correspondence Extract

Finally, with respect to Defendants' claim that any such training or claims handling materials are confidential, we note the following. First, Defendants have utterly failed to establish that the documents sought are confidential or proprietary.[1] Given that training documents and claim manuals are subject to disclosure to any ERISA claimant under ERISA's appeal procedures, any such claim would appear specious.[2] Second, when we invited Defendants to work with us on drafting a protective order with respect to materials that they would contend were confidential, beyond the reports of Dr. Player, Defendants spurned that opportunity and never responded. Accordingly, from our perspective and in the absence of any substantial proof of compliance with the production requests, we will insist that Defendants establish the confidentiality of the documents sought by these production requests on a document by document basis.[3]

III. Extract for Memorandum of Law

4. ***Standards for a Protective Order Under* Pansy**

The Third Circuit in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (1994), set forth standards to be used by the district courts in agreeing to the entry of protective orders during the course of discovery. The Third Circuit, after noting that the party seeking the protective order must demonstrate "good cause," addressed how "good cause" is established:

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23 F.3d at 786-87 (emphasis added); *see also Ornstein v. Bass*, 18 Phila. 328, 50 D. & C.3d 371 (1988) (Pa. R. Civ. P. 4012 is modeled on Fed. R. Civ. P. 26 and similarly places burden on movant to demonstrate good cause). Judge D'Alessandro in *Ornstein* noted that:

Establishing "good cause" requires, at a minimum, some evidence upon which a court can make a determination that harm will result from disclosure. The law is clear that "the determination of *whether good cause does or does not exist must be based upon appropriate testimony and other factual data, not the unsupported contentions and conclusions of counsel*." *Davis v. Romney*, 55 F.R.D. 337, 341 (1972).

50 D. & C.3d at 374-75 (emphasis added).

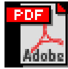
In order to establish that the materials sought are confidential or proprietary, defendants must show that: (1) the material "derives independent economic value" from generally not being known to others; (2) other persons can obtain independent economic value from its use; and (3) the materials are subject to reasonable efforts to maintain their secrecy. *Diamond State Ins. Co. v. Rebel Oil Co., Inc.*, 157 F.R.D. 691, 697-98 (D. Nev. 1994) (the burden is upon the party seeking protection to establish that the information is confidential). There must be evidence that the materials sought would cause substantial economic harm to defendants' competitive position. *Deford v. Schmid Products Co.*, 120 F.R.D. 648, 653 (D. Md. 1987) (the party's competitive position must be demonstrated by "specific demonstrations of fact, supported where possible by affidavits and concrete examples").

The fact that information disclosed might have a negative impact on reputation, may be incriminatory, or may be used against the party seeking the protective order in other litigation are insufficient to establish good cause for the entry of a protective order prohibiting dissemination. *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 301 (N.D. Ill. 1993) (information concerning dangerousness of product and defendant's knowledge thereof would not be subject to protective order barring

dissemination despite claim that such information was publicly embarrassing and incriminating); *Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539, 546-47 (D. Ind. 1991) (restaurant defendant's concern about harm it might suffer in instant or future litigation insufficient basis to grant protective order preventing dissemination of internal company documents concerning its 30-minute delivery guarantee).

Attachment

Double-click on icon below to view Adobe Acrobat document (must have Adobe Acrobat Reader installed).



Casper - Insurance attachment.pdf

Endnotes

[*]Portions of this paper were first presented under the title *How to Avoid Protective Orders in Insurance Litigation* at AAJ's (formerly ATLA®'s) *2003 Annual Convention*, San Francisco, CA. Also available on the CD-ROM version of these *Reference Materials* are opinions from the following cases: *Maglione v. Provident Life and Accident Ins. Co.*, No. 96-7525 (E.D. Pa. Mar. 26, 1998); *Schneider v. Provident Mutual Life Ins. Co.*, Case No. 97-4646SC (N.D. Cal. Nov. 12, 1998).

[1]Documents are entitled to be treated as confidential or trade secret if they meet three criteria: 1) they derive independent economic value from generally not being known to others; 2) other persons can obtain independent economic value from the materials' use; and 3) the materials are subject to reasonable efforts to maintain their secrecy. Diamond State Ins. Co. v. Rebel Oil Co., Inc., 157 F.R.D. 691 (D. Nev. 1994).

[2]Levy v. INA Life Ins. Co., No. 05 Civ. 10310, 2006 WL 3316849 (S.D.N.Y. Nov. 14, 2006).

[3]Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994); Foltz v. State Farm Mutual Automobile Ins. Co., 331 F.3d 1122, 1130-31 (9th Cir. 2003).